No. 82-1246

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IN THE

Supreme Court of the United States

October Term, 1983

BOSE CORPORATION,

Petitioner,

against

CONSUMERS UNION OF UNITED STATES, INC.,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENT

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Question Presented

Was the Court of Appeals in this product disparagement suit brought by a conceded public figure precluded by Fed. R. Civ. P. 52(a) from exercising independent judicial judgment to determine for itself whether the district judge sitting without a jury had properly applied the actual malice standard, when:

(i) this Court has held since New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964), that appellate courts in public figure defamation actions are required to make an independent examination of the entire record to determine if "the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands;" and

(ii) the Court of Appeals accepted

the trial judge's findings on underlying events and did not redetermine any disputed facts; and

(iii) the District Court based its findings upon an erroneous view of the law: it applied a reasonable belief criterion, inferred actual malice from the purported falsity alone and effectively held Consumers Union to strict liability because it is a responsible publisher having an intelligent staff which ergo is not capable of committing honest error; and

(iv) actual malice is an ultimate fact which has long been held not to be subject to the "clearly erroneous" rule; and

(v) the record permits only one rational conclusion: the firm and definite conviction that the district judge committed error?

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No. 82-1246

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BOSE CORPORATION,

Petitioner,

- against -

CONSUMERS UNION OF UNITED STATES, INC.,

Respondent.

BRIEF FOR RESPONDENT

Statement of the Case

The respondent in this twelve-year old product disparagement suit is Consumers Union of United States, Inc. (hereinafter "respondent," "Consumers Union," or "CU"), the highly-respected

nonprofit, independent consumer testing organization, which for forty-seven years has published the monthly magazine, CONSUMER REPORTS. As both the District Court and the Court of Appeals found (App. X4, 45),[1] CU and CONSUMER REPORTS had at the time of publication of the disputed review "a very favorable reputation for independence, integrity,

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1. Reference to the separate Appendix filed with the Petition for a Writ of Certiorari containing the opinions of the lower courts is to "App." followed by "X" and page numbers. Reference to the Joint Appendix filed in this Court is to "J.A." and page numbers. Reference to the Appendix in the Court of Appeals is to "A." and page numbers. Reference to the transcript of the trial of liability issues is to "LTr." and page numbers. Reference to petitioner's and respondent's exhibits is to "PX" numbers and "DX" letters, respectively.

accuracy, and freedom from bias."[2]

2. This well-deserved reputation continues to the present. CU has approximately one hundred thousand individual members, and the magazine CONSUMER REPORTS enjoys a circulation of approximately 2.7 million. CU's consistent efforts to provide consumers with truthful and independent judgments on goods and services in the consumer marketplace have been recognized by the courts. See Consumers Union of United States, Inc. v. Theodore Hamm Brewing Co., 314 F. Supp. 697, 698, 700 (D. Conn. 1970); In re Consumers Union of United States, Inc., 7 Media L. Rep. (BNA) 2038, 2039 (S.D.N.Y. 1981) (CONSUMER REPORTS is a "public service publication which advances a primary First Amendment objective by providing a public forum for impartial discussion of the safety, fitness for use and reliability of products offered to the consuming public"); Yiamouyiannis v. Consumers Union of United States, Inc., 619 F.2d 932, 940 (2d Cir.), cert. denied, 449 U.S. 839 (1980). Because consumer reporting helps citizens to make intelligent and well-informed marketplace decisions it commands full First Amendment protection. Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976); Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 280 (3d Cir. 1980).

This action stems from the petitioner's dissatisfaction with a review of the Bose 901 loudspeaker system contained in an article entitled "Loudspeakers" appearing in the May 1970 issue of CONSUMER REPORTS.

The eight-page article evaluated the quality and performance of twenty-four brands of loudspeakers;[3] only seven paragraphs in a boxed-off section captioned "Some loudspeakers of special interest" discussed the Bose product. After describing the unique and unconventional design of the 901 system, the review described the opinions of a panel

3. The full article (PX7; A. 475-81) appears at pages 272-78 of the May 1970 issue of CONSUMER REPORTS (PX2). Ten copies of the May 1970 issue have been lodged with the Clerk for the convenience of the Court. (J.A. 338)

who were asked to compare the Bose 901 with a conventional speaker system and to judge for each "the direction from which the sound appeared to come (App. X48)," when a tape recording of the sound of a moving cricket-like noisemaker was played through each system. No differences were reported.

Next, the article compared music heard through the 901 and a conventional speaker and described the Bose in terms which were conceded (App. X158 n.19) to be highly complimentary:

> When it came to music, the panelists immediately noted a remarkable difference between the systems. The Bose 901 seemed considerably more spacious and reverberant, actually to the point of giving the impression that the wall of the listening room had dropped away. The effect was rather dramatic and was felt from any listening position.

This praise was tempered somewhat by judgments contained in the next paragraph where CU expressed its impressions of size and movement effects subjectively perceived through the 901 (App. X158 n.20):

> But after listening to a number of recordings, it became apparent that the panelists could pinpoint the location of various instruments much more easily with a standard speaker system than with the Bose system. Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall.

These critical judgments were immediately limited and minimized by the next two sentences (id.):

> With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists.

After reporting that the "same spacial openness and size distortions" occurred with monophonic records played through the Bose, the review next offered CU's assessment of the 901's sound quality (App. X49):

> As for sound quality, if the Bose 901 had been rated with the main group of tested speakers, it would have fallen between the high- and medium-accuracy groups. The overall sound was of good quality with impressive bass, considering the small speakers. But the combination of the equalizer and the speakers tended to overemphasize the middle bass, giving it a somewhat overly full, heavy sound.

After discussing the Bose speaker's power requirements, the review concluded, not by recommending against purchase of the 901, but by inviting CONSUMER REPORTS readers to form their own opinions (id.):

> We think the Bose system is so unusual that a prospective buyer must listen to it and judge it for himself.

From the moment of publication Bose asserted there were numerous errors in the CU review. In February 1971, it commenced a civil action in the United States District Court for the District of Massachusetts charging CU with product disparagement, unfair competition and violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1976).[4]

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4. Issue was not joined until 1974 because Bose's original and amended complaints were each dismissed (with leave to replead) by the District Court.

At the liability trial,[5] the petitioner offered the testimony of only one witness: the founder, majority shareholder, chief executive officer and the namesake of the plaintiff corporation -- Amar G. Bose, Ph.D. Dr. Bose postulated at length on why Consumers Union's findings were either wrong or "scientifically impossible." (See, e.g., J.A. 27-58)

Although nearly ten years passed between the publication of the CONSUMER REPORTS article and the trial, Bose presented no evidence of any objective tests or measurements of the Bose 901 speaker system, and no evidence of any

5. The District Court severed the issues of liability and damages and held two non-jury trials.

listening tests in which the Bose or conventional loudspeakers were played before a group of observers (independent or otherwise) and their reactions recorded.

And Bose offered no proof whatever that CU published any statement with knowing or reckless falsity. Constitutional actual malice, the petitioner urged, could be inferred merely by accepting Bose's contention that when read literally the description of widened and wandering instruments was scientifically impossible and "could not have [been] heard." (LTr. 6-22) Moreover, Bose contended that CU's senior project engineer, Arnold L. Seligson, the person primarily responsible for conducting and supervising the research on the 901, deliberately downgraded the

petitioner's product in order to commercialize a potentially competing product supposedly embodied in a patent held by Seligson.

In contrast to the conclusory and unsupported trial testimony offered by the petitioner, Consumers Union introduced all of its relevant original research data; all of the documents involved in the editorial process, including original notes, drafts and revisions of the disputed review; the live testimony of Seligson and Alan Lefkow, the employees who conducted the research on the 901 and whose judgments are reflected in the published review; the live testimony of CU's technical director; and the expert testimony of Dr. David M. Green, the Chairman of Harvard's Department of Psychology and

Social Relations, a member of the National Academy of Sciences and a Fellow and the then president-elect of the Acoustical Society of America -- all of which demonstrated beyond cavil that CU labored long and hard with a consistent concern for truthful and responsible reporting in a successful effort to make the article accurately reflect the outcome of CU's research and the performance of the Bose system.

The evidence of CU's efforts and results, summarized in the following paragraphs, is uncontradicted. No contrary evidence was introduced to or credited by the District Court.

It was shown that Consumers Union had extensive experience in testing and reporting on loudspeakers and other consumer audio products. Prior to its

1969-70 tests of loudspeakers, Consumers Union had tested and reported on 100 or more different makes and models of loudspeakers over a ten year period. (J.A. 91-92) Since 1970, Consumers Union has tested at least 100 additional speaker systems. (Id.)

Consumers Union tested the Bose 901 in 1969 and 1970 as part of a much larger project involving twenty-four loudspeakers grouped into three categories. The research and editing process that led to publication was a lengthy one and involved many Consumers Union personnel and numerous internal checks and reviews. (J.A. 134-37, 145-47, 197-200)

Each speaker was subjected to an extensive battery of tests and measure-

ments which took several months to complete. These tests, which are described in detail by the District Court (App. X54-60), the Court of Appeals (App. X5-6) and in the CONSUMER REPORTS article (A. 475-76; PX7, pp. 272-73), were designed to measure both the objective electrical and acoustical output of the loudspeakers and the more subjective, psychoacoustical and aesthetic aspects of their performance. The tests were conducted and supervised by Seligson, then the Senior Project Engineer in charge of testing loudspeakers and other audio products, assisted by Lefkow, then a project engineer, two assistant project engineers and a statistician. (App. X50; J.A. 93-95)

Seligson and Lefkow were found to

be extremely capable, highly skilled and experienced in the testing and evaluation of loudspeakers. (App. X50-52, 30) Seligson has worked in the field of acoustics and testing of audio products since 1953. He received a bachelor's degree in electronic engineering from CCNY in 1952 and studied acoustics at Brooklyn Polytechnical Institute in 1953. From 1953 to 1956, while studying at night for a Master's degree, which he did not complete for personal reasons, Seligson worked for the United States Navy Laboratories testing acoustical equipment, such as microphones and loudspeakers. He joined Consumers Union in 1956 and has worked there ever since, except for a two-year period (1961-63) when he worked for a private corporation

on audio products. (J.A. 83-89; App. X51-52)

At Consumers Union, first as a Project Engineer, then as Senior Project Engineer and now as Chief of the Electronics Division, Seligson has worked on all aspects of the testing and evaluation of loudspeakers and other audio products. Prior to the 1969-70 tests, Seligson had participated in at least four or five Consumers Union loudspeaker projects involving the testing of at least 100 different brands and models of loudspeakers. (J.A. 91) As the District Court noted, Seligson has been testing and evaluating loudspeakers "for more than 25 years." (App. X52)

Because of the competence and expertise which Seligson demonstrated in

his work at CU -- testing and reporting on literally hundreds of audio products -- he was highly regarded and relied upon by his superiors. His work generated virtually no reader complaint mail and received an extraordinarily positive response from persons in the audio community, including the manufacturers whose products had been evaluated. (J.A. 201-03)

In addition to his work at Consumers Union, Seligson has written a scientific paper on microphone calibration, has been a monthly columnist for the Sunday New York Times on audio equipment, wrote an article for the February 1969 issue of Stereo Review on how Consumers Union tests loudspeakers (PX6) and has lectured publicly on the

testing and evaluation of audio products. (J.A. 89-90; LTr. 6-134-135) He also holds two patents, one granted in 1960 for a device similar to a condenser microphone, and the other granted in 1969 for an "Ionic Electro-Acoustic Transucer." (PX5) Neither patent has been used commercially.

Upon completion of the testing in January 1970, Seligson and Lefkow prepared the draft of the "Report to Editorial" -- a lengthy document which summarized the research and its results for Consumers Union's editorial department. The sections of the draft referring to the Bose 901 were drafted by Seligson and reviewed by Lefkow. (App. X65; J.A. 126-30) The draft was reviewed and revised by their superiors.

The revisions were widely circulated within Consumers Union. (J.A. 129-37, 145-47; App. X32-34)

Using the revised "Report to Editorial," a professional writer in Consumers Union's editorial department prepared a draft manuscript. (J.A. 134-35; App. X65-66) Prior to final approval for publication, the draft, subsequent revisions and galley proofs were circulated to and reviewed by Seligson, Lefkow, their superiors and others in several departments of Consumers Union for accuracy. (J.A. 129-37, 145-47, 200-03; App. X32-34)

At trial, both Seligson and Lefkow consistently testified that the published article accurately reflected the results of their research and the sub-

jective judgments they had reached as a result of testing the Bose product. They testified that at all times they had (and continue to have) a good faith belief in the truth of the entire review.

With respect to the comments on "instruments seem[ing] to grow to gigantic proportions and tend[ing] to wander about the room," Seligson described what he had heard during a listening test of the Bose in the following testimony which was credited and quoted by the trial judge (App. X95-97):

> As best as I could describe it, it would be that -- if you can imagine peering at an array of lights from a distance so when you view them they seem like a blur of lights somewhere in front of you; and in this array of lights there may be individual lights which twinkle more strongly and focus one's atten-

tion upon them, but the twinkling shifts from point to point so that one's attention is drawn first to one spot, then to another, but it would be difficult to see whether at those times when one's attention shifts to a bright spot, whether one has suppressed the fact that there is a broad light source behind.

This is something that occurs with time and it is a perception. It is difficult to recall precisely the manner in which I heard it, but that is about the best analogy that I could give you.

With the violin wide, the impression is one predominantly of sound coming at you from roughly the entire area in front of you.

In other words, roughly from in front of the entire area. But individual notes, however, may occasionally seem to focus a little better in one location than in another and give the impression that that is where the violin is for that moment.

And it is a shifting impression.

He concluded with this description of

his impressions (J.A. 180):

> It is something which is part of that vagueness which we mentioned in the story. We said simply it became apparent that the panelists could pinpoint the instruments much more precisely with a standard speaker system than with the Bose system. It is that difficulty in pinpointing the location that leads to some of the problems. It also makes it difficult to describe.

The other researcher whose observations formed part of the review, Alan Lefkow, described the subjective phenomena he had heard in these words also quoted by the District Court (App. X97):

> Yes, the piano seemed very wide in the sense that you could hear the various tones from the piano come in at many points right across the front of the room. And the violin, as the violin is

> played, the violin -- the source of the notes seemed to change as he played different notes. As he went up and down the scale, I heard the notes coming from different points, spread out between the two speakers.[6]

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6. The District Court conceded that others, independent of Consumers Union, observed similar effects. The Court quoted the trial testimony of Dr. David M. Green, one of the nation's leading psychoacousticians (App. X98):

> I have heard things [through the Bose 901] that I would describe as, first of all, as very broad image. There is no question about that. Secondly, the source is hard to localize. It's vague, and from moment to moment changes its location. So you might [say], especially on solo instruments, the apparent source moves from time to time. It could be located in any number of places in front of you. (See also J.A. 306-07)

Dr. Green also testified at length concerning the scientific principles involved which substantiate the validity of CU's judgments (J.A. 276-85) and described the results of an independent listening study he conducted with 16

(Footnote continued on next page)

When asked by the District Court to define the word "about" as used in the fragmentary phrase "tended to wander about the room," Seligson stated that

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(Footnote Continued from Previous Page)

persons unaffiliated with the parties who were unaware of the loudspeaker models being played and who compared movement of a flute heard through the 901 and a conventional speaker. (J.A. 285-311) The results of that experiment confirmed the truth of the CU assessment. Dr. Green thus concluded that solo passages played through the 901 "may be localized [by listeners] in different places in the listening room at different times" (J.A. 307), and that there was significantly more movement with the Bose 901 than with conventional speakers. (J.A. 299, 301, 303-04)

Although the District Court made passing reference to Dr. Green's testimony, the Court erroneously ruled that his personal observations of moving instruments and the results of his experiment with independent subjects were "irrelevant" because Seligson and Lefkow testified that the wandering sounds they heard were confined to an area within a few feet of the wall. (App. X162-63 n.33)

that word "was meant to mean about the rear wall between the speakers." He believed he had accurately conveyed this judgment to the reader by including in the text the example given in the next sentence: "For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall." (J.A. 123-24, 169-70)

Seligson and Lefkow each prepared a drawing at the trial in an attempt to depict on paper the size and movement phenomena they perceived. (PX 29, 35; J.A. 342-43) Both drawings indicated some movement towards and away from the wall, as well as laterally.

Seligson further testifed how difficult it was to describe precisely what he observed. (J.A. 180-82) He

called his trial drawings a "crude" or "broad" depiction of what he observed (J.A. 156), and because of the abstract and subjective nature of the experience, he had to resort to the array of shifting lights analogy quoted above. Dr. Green (J.A. 331-32) and Dr. Bose both agreed that it is quite difficult to translate an aural perception, an auditory image, into words. As Dr. Bose said, "there are no words to describe all the aesthetic aspects of sound." (J.A. 337)

The District Court rendered its decision on the liability issues in January of 1981, finding for Consumers Union on all claims save one. The unfair competition and Lanham Act counts were dismissed because after a "careful review of the testimony at trial," the

Court concluded that Bose failed to prove that CU was biased in its ratings of loudspeakers. (App. X145) Four of the review's statements alleged to constitute actionable product disparagement were held by the Court either not proven false or not shown to be defamatory.

The District Court held only one portion of one phrase of the article to be factually false[7] -- and that only by a preponderance of the evidence. The isolated fragment, "individual instruments heard through the Bose system ... tended to wander about the room," the Court found to be untrue because

7. In holding the fragment to be factual and not opinion, the District
(Footnote Continued on Next Page)

although the article reported accurately that "instruments...tended to wander," Consumer Union's engineers testified that

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Court wrongly wrenched the statement from its proper context as part of a judgmental, evaluative and figurative statement of aesthetic criticism. The statement was based on perceptions and judgments recognized by the District Court as being "subjective" and was replete with cautionary phrases of apparency that made its status as opinion crystal clear. The petitioner itself recognized that the phrase in issue was opinion and said so explicitly in a publication instructing its dealers on how to respond to the CONSUMER REPORTS article. (DX CU)

they heard the "wandering sounds" only "within a few feet of the wall near which the Bose 901 loudspeakers were placed." (App. X100) The difference between "tended to wander about the room" and "tended to wander about [or along] the wall" was what the Court found to be both false and disparaging.

The Court then determined that Bose met the tests enunciated by this Court in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and by the First Circuit in Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980), and was a "public figure, at least with respect to the limited issues of the characteristics

and quality of the Bose 901." (App. X132-33)[8] Accordingly, the constitutional rules of New York Times Co. v. Sullivan, 376 U.S 254 (1964), were held to apply.

Turning next to the issue of CU's asserted motivation to disparage the Bose product (an issue upon which plaintiff subjected Seligson to lengthy cross-examination and which constituted a "significant portion of the testimony at trial") (App. X133), the District Court rejected the petitioner's claims in their entirety (App. X136):

> Having reviewed the record and considered the demeanor of the witnesses involved, especially that of Seligson the Court finds that the possible

8. Bose conceded its public figure status on appeal and the Court of Appeals accepted the finding for purposes of the appeal. (App. X21)

> commercialization of his own patent did not influence Seligson's evaluation of loudspeakers for the Article. Specifically, the Court finds that Seligson did not downgrade the Bose 901 in order to smooth the way for his own invention. (emphasis supplied)

Bose's other claims that CU was motivated to disparage the 901 because of a bias against higher priced products, or to inject "sarcasm" and "spice" into its magazine, were rejected by the District Court because of "insufficient evidence" and because the testimony presented left the allegation "entirely within the realm of speculation." (App. X145)

Nonetheless, the District Court found that the disputed fragmentary phrase was published with "actual malice." (App. X142-43) As the fore-

going review of the undisputed trial testimony demonstrates, it did so without the benefit of any evidence, objective or subjective, upon which constitutional malice could be based. Instead, falsity plus the author's intelligence were erroneously held to create actual malice. In the Court's words (App. X142), Consumers Union's principal researcher was not to be believed solely because he

> is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible for the Court to believe that he interprets a commonplace word such as "about" to mean anything other than its

plain, ordinary meaning.[9]

A separate trial on the issue of damages followed. Basing his decision only upon hearsay assertions of a general decline in growth of sales (sales continued to increase after the article's publication) and awarding compensation for critical but non-actionable portions of the article, Chief Judge Caffrey assessed damages in the amount of $115,296.00 plus interest and costs of $95,609.24, a total of $210,905.24. This finding was also

9. Although resting on an improper application of the standard of constitutional malice, the District Court facilely labeled its finding as one of credibility. As shown in greater detail at pp. 65-71, infra, this ipse dixit has no validity and was induced by an erroneous view of the law.

plain error of constitutional dimension.[10]

Consumers Union's appeal to the First Circuit raised numerous questions of error in both the liability and damages holdings. Because it could find no evidence of actual malice, the Court of Appeals did not consider CU's principal claims of truth and nonactionable opinion. Assuming arguendo a false

10. Because it reversed on issues of liability, the Court of Appeals did not review the damages findings. In fact, sales of the 901 increased dramatically after the CU article was published. 1970 sales increased incrementally over 1969 sales by some 48% and sales increased at an average annual rate of 35% until 1974. (A. 454, 567) Sales in late 1970 exceeded Bose's internal forecasts and were characterized by Bose itself as a remarkable performance. (A. 543-44) Starting with zero percent of the loudspeaker market in 1968, Bose grew to a position of first or second in dollar volume by 1971. (A. 94-96, 473-74, 540-41)

statement of fact (even though the Court noted, "we are not sure that the statement that instruments tended to wander about the room is false") (App. X19), the Court of Appeals reviewed the entire evidence "to ensure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof." (App. X23-24)

In carrying out its review, the appellate court held that this Court's decisions in New York Times Co. v. Sullivan, 376 U.S. 254, 285 & n.26 (1964), and Time, Inc. v. Pape, 401 U.S. 279, 284 (1971), required it to examine the record independently to determine if the evidence could constitutionally support the lower court's conclusion of

actual malice.

Exercising independent judicial judgment without re-resolving any disputed factual findings or redetermining credibility,[11] the Court of Appeals faulted the District Court for its legal error in misapplying the constitutional standard of actual malice and held that "[t]o find actual malice in this case would be to interpret that concept to require little more than proof of falsity." (App. X36) Having found that the District Court's findings rested on an erroneous view of the law, the Court of Appeals reversed.

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11. The Court of Appeals explicitly "recognize[d] that [it was] in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact." (App. X23)

Given the proper application of the constitutional actual malice standard, and since only one rational result was possible on the undisputed facts that reversal was eminently correct.

Summary of the Argument

Since New York Times Co. v. Sullivan, 376 U.S. 254 (1964), this Court has consistently held that independent appellate review of the record to determine whether actual malice had been proved with convincing clarity was an integral part of the protection the First Amendment affords publishers in defamation actions brought by public figures. Since the Seventh Amendment does not preclude independent appellate

review, a fortiori, neither can Fed. R. Civ. P. 52(a). To abandon the independent review requirement would eviscerate this constitutional protection as it would place in the factfinder's hands unreviewable final authority over fundamental First Amendment freedoms. In any event, the Court of Appeals here exercised only limited independent judicial judgment and did not redetermine disputed facts or review credibility findings.

The District Court's finding of actual malice was based on an erroneous view of the law and was thus properly reversed under any standard of appellate review. Pullman-Standard v. Swint, 456 U.S. 273, 287, 292 (1982). The trial court erred in imposing a negligence or

"reasonable person" standard rather than requiring petitioner to prove by clear and convincing evidence "subjective awareness of probable falsity." Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n.6 (1974). See St. Amant v. Thompson, 390 U.S. 727 (1968); Garrison v. Louisiana, 379 U.S. 64 (1964). Applying the wrong legal standard, the District Court found actual malice because it held that the author was too intelligent to have made an honest mistake. This finding, contrary to governing law, rewards ignorance and sloppy journalistic practices at the expense of the honest, intelligent publisher -- a result that turns New York Times on its head.

Under New York Times, the determi-

nation of actual malice is a mixed question of law and fact. In cases implicating fundamental constitutional rights, such determinations, sometimes called "ultimate facts," are subject to unhindered appellate review to ensure that the Constitution has not been abridged and that the evidence satisfies the high "clear and convincing" standard. Baumgartner v. United States, 322 U.S. 665 (1944).

The District Court's finding of actual malice was clearly erroneous. The evidence, virtually all of which was undisputed, shows beyond doubt that Consumers Union followed its normally careful editorial procedures, evidenced great concern for the truth and published a balanced and fair report of the

results of its own research on the Bose 901. Seligson, Consumers Union's chief test engineer and the principal author of the disputed passage, is an expert who is highly regarded in the field of audio testing. Despite petitioner's massive and sometimes vicious attack on Seligson's honesty and integrity, the District Court repeatedly upheld Seligson's credibility and freedom from conflict of interest or motive to disparage. The trial court's finding of actual malice is inconsistent with the trial court's findings on all other credibility and motive issues and violates the principle that disbelief alone does not supply affirmative proof, much less clear and convincing proof. The only rational conclusion from the

evidence is that, if Consumers Union chose the wrong word to use in its subjective, aesthetic criticism, it was a mistake honestly made.

Argument

POINT I

The Independent Appellate Review Carried Out by the Court of Appeals to Determine Whether the Constitutional Actual Malice Standard was Properly Applied is a Substantive Right Unaffected by a Rule of Civil Procedure

The petitioner's contention that Fed. R. Civ. P. 52(a) compelled the Court of Appeals to uphold the district judge's conclusion of actual malice ignores the long line of cases in this Court which make actual malice a constitutional standard, the determination of which must be reviewed independ-

ently against requirements drawn from the First Amendment.

In the landmark decision of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Supreme Court for the first time placed constitutional limitations upon public officials bringing libel suits.[12] Now, the First Amendment requires the public official or public figure[13] libel plaintiff to prove that the defamatory statement is false and to establish with convincing clarity that

12. Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191, 194 ("the [New York Times] opinion makes a notable shift in constitutional idiom...."). See also Anderson, Libel and Press Self-Censorship, 53 Tex. L. Rev. 422 (1975).

13. The constitutional rules adopted in New York Times were extended to public figures in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). See Gertz v. Robert Welch, Inc., 418 U.S. 323, 336 n.7 (1974).

the statement was made with actual malice -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Because the First Amendment freedoms involved are fundamental, the New York Times Court included, as an integral and inseparable part of the constitutional protection afforded to publishers, the right to have appellate courts independently examine the entire record to determine for themselves whether "the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands." 376 U.S. at 285-86. These principles were stated as follows:

> Since respondent may seek a new trial, we deem that considerations of effective judicial

administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. [T]he rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see...whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." Pennekamp v. Florida .... We must "make an independent examination of the whole record," Edwards v. South Carolina...so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law.

376 U.S. at 284-286 (emphasis supplied) (citations and footnote omitted).[14]

These constitutional guideposts have been followed in every public official and public figure defamation suit to reach this Court. For example, in Time, Inc. v. Pape, 401 U.S. 279, 284 (1971), in reversing a decision by the Seventh Circuit which had overturned a district judge's grant of a directed verdict for the publisher, the Court referred to the "settled principle" that

> [i]n cases in which there is a claim of denial of rights under this Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis

14. Professor Kalven summarized the Times Court's holding as "mak[ing] actual malice a 'constitutional fact' that it will review de novo and indeed did review de novo in the case itself." Kalven, supra note 12, at 220.

> on which those conclusions are founded." [W]e have frequently had occasion to review "the evidence in the...record to determine whether it could constitutionally support a judgment" for the plaintiff. (citations omitted).

And, in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), the plurality concluded that independent appellate review of constitutional facts is not merely permissive but is a constitutional mandate:

> Clearly, then, this Court has an "obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments," and in doing so "this Court cannot avoid making an independent constitutional judgment on the facts of the case." The simple fact is that First Amendment questions of "constitutional fact" compel this Court's de novo review.

403 U.S. at 54 (citations omitted).[15]

Indeed, the teachings of New York Times and its progeny in this regard have received the virtually unanimous praise of First Amendment scholars and have been adopted by the American Law

15. As noted, the Court has been unswervingly faithful to these principles. See, e.g., Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 11 (1970); St. Amant v. Thompson, 390 U.S. 727, 732-33 (1968); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 83 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130, 158 (1967); Rosenblatt v. Baer, 383 U.S 75, 86 (1966).

Institute.[16]

To urge, as petitioner does, that Rule 52(a) strips away the independent review required by the First Amendment would produce the anomalous result of apotheosizing a rule of civil procedure to a more weighty and dispositive category than the Seventh Amendment to the Constitution of the United States. In New York Times, the Court explicitly

16. See T. Emerson, The System of Freedom of Expression 535-37 (1970); Restatement (Second) of Torts § 580A comment g (1977); R. Sack, Libel, Slander, and Related Problems 538, 560 (1980); Anderson, Libel and Press Self-Censorship, 53 Tex. L. Rev. 422, 467-468 (1975); Oakes, Proof of Actual Malice In Defamation Actions: An Unsolved Dilemma, 7 Hofstra L. Rev. 655, 707-09 (1979); Robertson, Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc., 54 Tex. L. Rev. 199, 249-250 (1976).

rejected the argument that the Seventh Amendment ("no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law") forebade independent appellate review. In language that could not be more to the point it was stated:

> But its ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts. "[T]his Court will review the finding of facts by a State court ...where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." Fiske v. Kansas, 274 U.S. 380, 385-386. See also Haynes v. Washington, 373 U.S. 503, 515-516.

376 U.S. at 285 n.26.

If even the Seventh Amendment is

deemed not to diminish the requirement of independent review of facts decisive of constitutionality, it follows inexorably as an a fortiori proposition that Rule 52(a) cannot do so.

Although this Court has never had the opportunity to rule on the issue presented here in a defamation case,[17] just last Term the Court held, in a case involving the First Amendment claim of a government employee tried before a district judge without a jury, that it has a constitutional "obligation ... [to] mak[e] an independent constitu-

17. But see Time, Inc. v. Pape, 401 U.S. 279, 284 (1971), where the Court exercised the rule of independent appellate review where the question before it was the propriety of the grant of a directed verdict for the publisher by a federal district court judge.

tional judgment on the facts of the case." Connick v. Myers, ___ U.S. __, 51 U.S.L.W. 4436, 4439 n.10 (Apr. 20, 1983).

Numerous federal appeals courts have held that Rule 52(a) cannot limit independent judicial judgment where First Amendment rights, including the determination of actual malice in libel suits, are involved. In Buckley v. Littell, 539 F.2d 882, 888 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977), the Second Circuit specifically held the clearly erroneous standard to be overridden by the "duty to 're-examine the evidentiary basis' of the lower Court decision," even when the fact-finder is a federal judge. And in Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353, 1363 (5th Cir.), cert.

dismissed, 447 U.S. 931 (1980), when the constitutional fact before it was obscenity, the Fifth Circuit held that this Court's decision in Miller v. California, 413 U.S. 15, 25 (1973), required it to exercise independent review, although the fact-finder was a judge. The Sixth Circuit held in Guzick v. Drebus, 431 F.2d 594, 599 (6th Cir. 1970), cert. denied, 401 U.S. 948 (1971), that "when dealing with questions of constitutional magnitude, we are not at liberty to accept the fact trier's findings merely because we consider them not 'clearly erroneous' as that term is employed in Rule 52(a) F.R. Civ.P. We must make our own examination of the material from which decision is made." See also Davis Co. v. United

Furn. Workers, 674 F.2d 557, 563 (6th Cir.), cert. denied, 103 S. Ct. 296 (1982); Sambo's Restaurants, Inc. v. Ann Arbor, 663 F.2d 686, 690 (6th Cir. 1981); Glasson v. Louisville, 518 F.2d 899, 903 (6th Cir.), cert. denied, 423 U.S. 930 (1975).[18]

18. The following decisions, representing appeals from cases tried before juries as well as those in which the district judge ruled upon a motion for summary judgment, all stand for the proposition that independent appellate scrutiny of an actual malice conclusion is mandated: Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.) (jury), cert. denied sub nom. Hotchner v. Doubleday & Co., 434 U.S. 834 (1977); Pierce v. Capital Cities Communications, Inc., 576 F.2d 495, 510 n.70 (3rd Cir.) (judge), cert. denied, 439 U.S. 861 (1978); Baldine v. Sharon Herald Co., 391 F.2d 703, 706 (3d Cir. 1968) (jury); Ryan v. Brooks, 634 F.2d 726, 728 (4th Cir. 1980) (jury); Long v. Arcell, 618 F.2d 1145, 1147 (5th Cir. 1980) (jury), cert. denied, 449 U.S. 1083 (1981); Brewer v. Memphis Publishing Co., 626 F.2d 1238, 1258 (5th Cir. 1980) (jury), cert. denied, 452 U.S. 962 (1981);

No valid reason has been or can be put forth as to why this Court should abnegate the role of independent appellate scrutiny of the proper application of the constitutional malice standard when the fact-finder is a single and fallible federal judge rather than a state court judge or a federal or state jury. Assuredly, the compulsion to defer to a state court or to any jury is greater than that to be accorded to an individual federal judge. Deference to juries enjoys constitutional dignity and is phrased absolutely while any defer-

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Vandenburg v. Newsweek, Inc., 507 F.2d 1024, 1026-27 (5th Cir. 1975) (jury); Fadell v. Minneapolis Star and Tribune Co., 557 F.2d 107, 108 (7th Cir.) (judge), cert. denied, 434 U.S. 966 (1977). See also Berry v. National Broadcasting Co., 480 F.2d 428, 432 (8th Cir. 1973) (jury), cert. dismissed, 418 U.S. 911 (1974) (jury) (false light, invasion of privacy).

ence to be accorded to a federal judge is based upon a mere procedural rule.

To elevate Rule 52(a) to a status compelling an appellate court to be bound by a district judge's application of the actual malice standard (especially in the circumstances of this case where the finding of actual malice is not only totally lacking in support in the record but is in conflict therewith and was plainly induced by an error of law) would be to give that procedural rule an effect that works a fundamental unfairness at war with the First Amendment, cf. Lisenba v. California, 314 U.S. 219, 237-38 (1941), and would engender public dismay at an arbitrary judicial administration.

Unless proper corrective authority

can be exercised by the Courts of Appeals, the constitutional standards for determining actual malice will differ from individual judge to individual judge. The First Amendment protections will lose their unity and certainty and freedom of expression will be dampened.

Moreover, unfair and unjust holdings which become impervious to reversal could lead to public contempt for the judicial system. As stated by Professor Blume, a member of the Advisory Committee on Rules for Civil Procedure which drafted Rule 52(a) and one of the leading proponents of the Rule as drafted, "[a] sure way to arouse distrust and suspicion in the public mind is to give the district judge final power over life, liberty or property." Blume,

Review of Facts in Non-Jury Cases, 20 Am. Jud. Soc'y 68, 71 (1936).

To preserve the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open," to give "the freedoms of expression...the 'breathing space' that they 'need...to survive,'" and to assure that "constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered,'" New York Times, 376 U.S. at 270-72, it is essential that blinders not be placed over the eyes of our appellate courts and that the constitutionally-based rule of independent judicial judgment not here be eviscerated.[19]

19. Justice Goldberg's statement in
(Footnote Continued on Next Page)

Further, a full reading of the Court of Appeals' opinion makes it plain that that court exercised its independent review in a limited fashion, only "to ensure that the district court had applied properly the governing constitutional law and that the plaintiff had indeed satisfied its burden of proof." (App. X22-23) The appellate court did not re-review or redetermine any disputed underlying facts. There were none. Nor did it purport to go

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Haynes v. Washington, 373 U.S. 503, 515-16 (1963), is particularly apposite: "[W]e cannot avoid our responsibilities by permitting ourselves to be 'completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding.'" (emphasis supplied). See also Wood v. Georgia, 370 U.S. 375, 386 (1962).

beyond any legally valid credibility finding by the district judge. It did not reweigh or reevaluate conflicting testimony concerning the subsidiary events which led to the District Court's conclusion of actual malice. The Court of Appeals' review accepted the District Court's findings and independently reviewed only the definition and proper application of the constitutional standard by which those incontrovertible facts were to be tested. The meaning of undisputed facts in relation to the First Amendment standard of actual malice is precisely the constitutional issue which this Court has directed that federal appellate courts reserve for themselves.

As Justice Frankfurter stated in Watts v. Indiana, 338 U.S. 49, 51 (1949):

> [An] "issue of fact" is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication.

Unquestionably, the proper domain of any appellate court exercising independent review of facts having fundamental constitutional significance includes well within its ambit (without even approaching the outer limits of the proper scope of independent review) the right to determine for itself without any artificial constraint whether the conclusion of constitutional malice is

adequately supported in the record and whether the constitutional rules have been properly applied.

The standard of review, as employed by the Court of Appeals, was therefore eminently correct.

POINT II

As the District Court's Determination of Actual Malice was Based on an Error of Law, It is Not Subject to Rule 52(a) and was Properly Reversed by the Court of Appeals

Under any set of circumstances, Rule 52(a) does not apply in this case because "if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982). See also Inwood Laboratories, Inc. v. Ives Laboratories,

Inc., 456 U.S. 844, 856 n.15 (1982).

Recognizing that the district judge had committed plain legal error ("[t]o find actual malice in this case would be to interpret that concept to require little more than proof of falsity") (App. X36) the Court of Appeals properly reversed.

From New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964), to the present this Court has never wavered in rigorously defining and demanding proper application of the constitutionally-required actual malice standard. See, e.g., Herbert v. Lando, 441 U.S. 153, 156 (1979). The plaintiff through clear and convincing proof must adduce sufficient evidence to establish that the publisher acted with "subjective aware-

ness of probable falsity," Gertz v. Robert Welch, Inc., 418 U.S. at 332 n.6, that he in fact knew what he published was false or "in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

This Court has resisted all efforts by public official and public figure plaintiffs to diminish the definition or to allow actual malice to mean something less than what the First Amendment requires. Falsity, defamatory content, unreasonable belief in the truth, negligence, strict liability, misinterpretation or misconception of the facts -- all of these have been rejected as sufficient bases by themselves, or in combination, to establish actual malice. Gertz v. Robert Welch, Inc., supra;

Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Time, Inc. v. Pape, 401 U.S. 279 (1971); St. Amant v. Thompson, supra; Greenbelt Cooperative Publishing Ass'n. v. Bresler, 398 U.S. 6 (1970); Rosenblatt v. Baer, 383 U.S. 75 (1966); Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times Co. v. Sullivan, supra.

The "honest utterance, even if inaccurate," must be protected because it "further[s] the fruitful exercise of the right of free speech." Garrison v. Louisiana, 379 U.S. at 75.

The District Court, however, ignored these clear holdings. By substituting its own predilection of how a reasonable person would have acted, the

trial court misapplied the applicable law and committed legal error of constitutional magnitude.

The District Court did not find that "the publication was [not] made in good faith." St. Amant v. Thompson, 390 U.S. at 732. Indeed, quite the opposite is the case. The District Court never doubted Consumers Union's good faith (App. X140) and it rejected out of hand all of petitioner's attacks upon the honesty or integrity of Consumers Union and its staff. (App. X133-38, 143-45)

Rather, the District Court, eleven years after publication, held solely that it was unreasonable for an intelligent man to have confused "about the room" with "about (or along) the wall."

Such a finding, the Court of Appeals rightly held, is erroneous as a matter of law.

Ever since New York Times Co. v. Sullivan it has been clear that actual malice cannot be inferred from falsity alone.[20] A "test of truth," this Court has repeatedly said, does not provide the "breathing space" that the "freedoms of expression...'need to survive.'" New York Times at 271-72.

A finding of actual malice that is based upon a notion of the unreasonableness of a publisher's belief in

20. "[N]either factual error nor defamatory content suffices to remove the constitutional shield...." New York Times Co. v. Sullivan, 376 U.S. at 273. And see Justice Goldberg's concurring opinion, 376 U.S. at 298 n.2: "The requirement of proving actual malice or

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the truth suffers from such a defect: "[t]he reasonable-belief standard...is not the same as the reckless-disregard-of-truth standard." Garrison v. Louisiana, 379 U.S. at 79. As the Court held in St. Amant v. Thompson:

> But New York Times and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies.

390 U.S. at 731-32.

The District Court strayed far from these teachings. In determining actual

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(Footnote Continued from Previous Page) disregard may, in the mind of the jury, add little to the requirement of proving falsity, a requirement which the Court recognizes not to be an adequate safeguard."

malice by combining a highly irrational, unique and extra-contextual interpretation of the character and content of the publication with an objective, reasonable person standard, it afforded Consumers Union none of the "breathing space" for erroneous statement this Court has been so careful to preserve. The trial court effectively held Consumers Union to strict liability: because CU is a highly professional publisher with an intelligent staff, CU is not capable of committing honest error.

That the District Court misapplied the constitutional standards despite its denials (App. X140) is plain from a reading of its opinion. After acknow-

ledging Consumers Union's consistent professions of good faith belief in the accuracy of the article as written (id.), and in the absence of any contradictory evidence, the District Court concluded (App. X141-42) that actual malice existed only because

> according to Seligson, the words used in the Article -- "About the room"--mean something different to him than they do to tne populace in general. If Seligson is to be believed, at the time of publication of the Article he interpreted, and he still interprets today, the words "about the room" to mean "along the wall." After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible. Seligson is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible for the Court to believe that he interprets a commonplace word such as "about" to mean anything other than its

plain, ordinary meaning.[21]

Expressed simply, the District Court's conclusion was based only on the following equation: falsity + the author's intelligence = actual malice.

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21. The District Court relies on its own view, not supportedly by any evidence in the record or by any citation, of the strict, literal meaning of the words used by Consumers Union. Regardless of whether the Court's definitions are correct, such "[a] fussy insistence upon literal accuracy 'would condemn the press to an arid, dessicated [sic] recital of bare facts.'" Loeb v. Globe Newspaper Co., 489 F. Supp. 481, 486 (D. Mass. 1980). Particularly where, as here, the subjective perception being described is inherently ambiguous and admittedly difficult to describe precisely (see pp. 20-26, supra), the reader will not interpret the comment literally (as the District Court agreed, App. X92-93), but in a "loose, figurative sense." National Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974). The description is thus analogous to protected "rhetorical hyperbole," Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970), (Footnote Continued on Next Page)

This Court, however, has already rejected a nearly identical finding of actual malice similarly improperly based on a reasonable person standard. In Garrison v. Louisiana, supra, the trial judge had made a determination virtually identical to that of the District Court here:

> It is inconceivable to me that the Defendant could have had a reasonable belief, which could be defined as an honest belief, that not one but all eight of these Judges of the Criminal District Court were guilty of

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(Footnote Continued from Previous Page) or "[m]ere exaggeration, slight irony or wit, or all of those delightful touches of style which go to make an article readable [but] do not push beyond the limitations of fair comment." Briarcliff Lodge Hotels, Inc. v. Citizens-Sentinental Publishers, Inc., 260 N.Y. 106, 118-19, 183 N.E. 193 (1932).

> what he charged them with in the defamatory statement....It is inconceivable to me that all of them could have been guilty of all of the accusations made against them. Therefore, I do not believe that the qualified privilege...is applicable...."

379 U.S. at 78-79.

This Court rejected that analysis: "This is not a holding applying the New York Times test. The reasonable-belief standard applied by the trial judge is not the same as the reckless-disregard-of-truth standard." Id. at 79.

As the Court stated in Garrison, and reaffirmed repeatedly thereafter:

> The test which we laid down in New York Times is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on disregard

for the truth.[22]

Even if by second guessing it could be said that Seligson should have known that his description was inaccurate, even if he and his superiors should have been more careful and more precise in their use of language, that they were not is not a constitutionally acceptable ground for finding actual malice. The case is even clearer here where the publisher was engaged in a subjective critique and

22. See, e.g., Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. at 10 (It was error of constitutional magnitude "to find liability merely on the basis of a combination of falsehood and general hostility"); Curtis Publishing Co. v. Butts, 388 U.S. 130, 152 (1967) ("[W]e have rejected...the argument that a finding of falsity alone should strip protections from the publisher.").

aesthetic evaluation (App. X60); where the language employed was suffused with metaphorical and figurative usage; and where, as the District Court found, the terminology used by those in the field is replete with "confusion." (App. X87, 162 n.29)

To find actual malice here would be as impermissible as the Court held it to be in Time, Inc. v. Pape, 401 U.S. 279, 291 (1971): "[First Amendment] protection would not exist for errors of interpretation...for once a jury was satisfied that the interpretation was 'wrong,' the error itself would be sufficient to justify a verdict for the plaintiff." Even if Seligson were wrong, that is, even if he chose the wrong language to describe the subjective, abstract, aural

phenomenon he heard in the mistaken belief that it was the correct phrase, he cannot be said to be guilty of actual malice because he believed it to be truth. Tilton v. Cowles Publications Co., 76 Wash. 2d 707, 459 P.2d 8, 15, 18 (1969), cert. denied, 399 U.S. 927 (1970). See also Loeb v. New Times Communications Corp., 497 F. Supp. 85, 93 (S.D.N.Y. 1980); Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1350 (S.D.N.Y. 1977); R. Sack, Libel, Slander, and Related Problems 213 (1980) ("A person who believes and intends to say one thing is not lying and not guilty of actual malice merely because he chooses the wrong language to say it.")

In the absence of any evidence at all that "impeaches the witness' good

faith" belief that his description was "substantially correct," New York Times Co. v. Sullivan, 376 U.S. at 286, (the District Court did not and could not point to any such evidence because none existed), the conclusion of actual malice was plainly based on an erroneous interpretation of the law and was properly reversed by the Court of Appeals.

POINT III

The Court Of Appeals Properly Exercised Independent Review Because the Determination of Actual Malice is an Ultimate Fact Involving Both Law and Fact Issues

Even if actual malice were not required to be reviewed independently under New York Times and its progeny and even if the district judge had not reached his conclusion because of an

erroneous view of the law, Rule 52(a) would still not control under traditional standards of appellate review.

Actual malice is not simply a factual determination. It is an "ultimate fact" -- an issue in which law and fact are so intertwined and the standard of proof required so high that appellate courts have not been held bound by what the trial court may label "findings of fact."

Since it is not possible to separate the legal component of a finding of actual malice from the factual one, and because the determination implicates fundamental constitutional rights, appellate courts, this Court held in New York Times Co. v. Sullivan, 376 U.S. 254, 285 n.26 (1964), are required to exercise

independent review to ensure that the governing law is properly applied to the facts.

In this regard New York Times echoes an earlier holding by this Court to the same effect. In Baumgartner v. United States, 322 U.S. 665 (1944), the issue was whether the Government could revoke petitioner's citizenship. It had previously been decided, in Schneiderman v. United States, 320 U.S. 118, 125 (1943), that the Government had to prove by "clear, unequivocal and convincing" evidence that the petitioner had fraudulently misrepresented his true allegiance when becoming an American citizen. Despite concurrent findings of fact by two lower courts, this Court in Baumgartner conducted its own independent

review of the record and reversed the lower courts' holding that Baumgartner had committed fraud.

In so doing, Justice Frankfurter recognized that certain types of factual findings -- "ultimate facts" involving questions of both law and fact -- are freely reviewable by appellate courts even if credibility findings are involved:

> The phrase "finding of fact" may be a summmary characterization of complicated factors of varying significance for judgment. Such a "finding of fact" may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print.... Finding so-called ultimate "facts" more clearly implies the application of standards of law.... Though labeled "finding of fact," it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the

> conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of "fact" that precludes consideration by this Court.

322 U.S. at 670-71.

In words that apply with equal force to the finding of actual malice here, Justice Frankfurter stated that since the "decision here for review cannot escape broadly social judgments" touching upon important fundamental rights, the "recognized scope of appellate review is usually differentiated from review of ordinary questions of fact." Id. at 671.

Unimpeded appellate review, the Court stressed, is particularly important when the standard of proof is higher than usual -- when it is "clear and convincing" rather than a mere "preponderance." Otherwise, the policy considerations underlying such a high

standard will be left to the whim and fancy of the finder of fact:

> Suffice it to say that emphasis on the importance of "clear, unequivocal, and convincing" proof...would be lost if the ascertainment by the lower courts whether that exacting standard of proof had been satisfied on the whole record were to be deemed a "fact" of the same order as all other "facts," not open to review here.

Id. at 671 (citation omitted).

This Court has recently restated and reaffirmed the importance to society and to litigants of the setting of a high standard of proof:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Addington v. Texas, 441 U.S. 418, 423 (1979); see also Sumner v. Mata, 449 U.S. 539, 551 (1981).

The higher standard has been required in public figure defamation cases in recognition of the fundamental First Amendment liberties involved: "the interests at stake...are deemed to be more substantial than mere loss of money." Addington v. Texas, 441 U.S. at 424.

If the protections afforded by the First Amendment are to be preserved and the standard of clear and convincing proof of actual malice is to have meaning and continued vitality, appellate courts, as the Court of Appeals recognized, must exercise independent review of the trial court's ultimate finding of actual malice.

To hold otherwise would have the practical effect of making the trial judge the sole and final arbiter of both the legal and the factual questions involved and would leave the standard of proof to "the unguided discretion of a [trial judge]." Time, Inc. v. Pape, 401 U.S. at 291.

Even in cases not involving this higher standard of proof, this Court has recognized that some factual issues are so intertwined with principles of law as to require plenary appellate review. This Court has often stated that the determination of a "mixed question of law and fact" can be freely reviewed by an appellate court:

> The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary or circumstantial facts. It is subject to judicial review and, on such

> review, the court may substitute its judgment for that of the [fact-finder].

Helvering v. Tex-Penn Oil Co., 300 U.S. 481, 491 (1937). Accord, Bogardus v. Commissioner, 302 U.S. 34, 39 (1937); Helvering v. Rankin, 295 U.S. 123, 131 (1935). Cf. United States v. General Motors Corp., 384 U.S. 127, 141 n.16 (1966); United States v. United States Gypsum Co., 333 U.S. 364, 396 (1948). But see Commissioner v. Duberstein, 363 U.S. 278, 289 n.11 (1960).

Pullman-Standard v. Swint, 456 U.S. 273 (1982), is in accord. In that case, the Court recognized that there is a "mixed question of law and fact of the kind that in some cases may allow an appellate court to review the facts to see if they satisfy some legal concept of discriminatory intent." 456 U.S. at

289 (footnote omitted).[23]

Actual malice is such a "legal concept." It is a constitutionally-based construct which denotes a complex or matrix of legal and factual determinations -- the social judgment --that must be made with great confidence and certainty in the outcome before the protections of the First Amendment may be taken away from a publisher. It is completely infused with legal policy and constitutional considerations and is thus wholly unlike the traditional, purely factual findings of design, motive or

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23. Cf. United States v. Appalachian Power Co., 311 U.S. 377, 404 (1940):
> When we deal with issues such as these before us, facts and their constitutional significance are too closely

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intent that stand apart from legal standards and that cannot ordinarily be reversed unless clearly erroneous.

The Court need not rule in this case that all mixed questions of law and fact are independently reviewable. Baumgartner v. United States, 322 U.S. 665 (1944), and New York Times Co. v. Sullivan, 376 U.S. 254 (1964), hold, at the very least, that when such a mixed question involves fundamental rights and must be proved with convincing clarity, appellate review cannot be narrowly circumscribed by a trial court's use of the label "finding of fact". In such

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> connected to make the two-court rule a serviceable guide. The legal concept of navigability embraces both public and private interests.... Both the standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied.

circumstances, the appellate court may -- indeed, must -- conduct an independent review to ensure that the governing legal principles have been properly applied and that the ultimate finding is consistent with the constitutional principles at stake.

The Court of Appeals properly conducted such a review. Its conclusion should be affirmed.

POINT IV

The District Court's Finding of Actual Malice is Clearly Erroneous.

Petitioner urges that because the district judge purported to base his conclusion of actual malice in part on demeanor, it is a credibility finding which binds an appellate court unless "clearly erroneous." (Pet. Br. at 49)

As previously shown, however, the trial court's actual malice determination was not a valid credibility finding which the Court of Appeals could not look behind but, rather was a conclusion based on an erroneous view of the law, or was a finding of a constitutional or an ultimate fact, each of which calls for independent appellate review.

Nonetheless, even if it is held that the finding of actual malice can be reversed only if it is "clearly erroneous" under Fed. R. Civ. P. 52(a), it must still fall.

Rule 52(a) "was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice." United States

v. United States Gypsum Co., 333 U.S. 364, 394-95 (1948) (footnote omitted). Its purpose is to permit appellate courts to "reverse findings of fact by a trial court where 'clearly erroneous,'" id. at 395, free of the constitutional limitations imposed by the Seventh Amendment on appellate review of fact-finding by juries.[24]

The rule does not make the trial court's findings, even when involving "the candor and credibility of the witnesses," binding or conclusive on appeal. United States v. United States Gypsum Co., 333 U.S. at 395.[25] The test,

24. For a recent history of the adoption of Rule 52(a), see Note, Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule Been Clearly Erroneous?, 52 St. John's L. Rev. 68, 69-75 (1977).

25. Indeed, in Gypsum the Court reversed a finding based on credibility as being clearly erroneous. 333 U.S. at 396.

set forth in Gypsum and often repeated since, is:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Id. [26]

There is no evidence below to support the trial court's finding of actual malice. When scrutinized under any standard of appellate review, the record admits of but one rational conclusion: the definite and firm conviction that a mistake was made.

Summarized here, (the evidence is described in greater detail in the

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26. Whether the appellate court can exercise independent review or is bound by the clearly erroneous test, the appellate court must still review all the evidence in the record.

Statement of the Case, pp.12-19, 30-31, supra), the evidence, virtually all undisputed and uncontradicted, demonstrates beyond cavil that not a scintilla of evidence existed upon which a rational finding of actual malice could be based:

a) Consumers Union and its magazine have a "very favorable reputation for independence, integrity, accuracy and freedom from bias" (App. X4, 45);

b) the disputed article was the end result of a lengthy process of original research (App. X5-6, 54-60; A. 475-76; PX7, pp. 272-73) and careful editorial preparation (J.A. 129-37, 145-47, 200-03; App. X32-34);

c) Seligson, the engineer in charge of the research and the person primarily responsible for the preliminary drafts of

the article, had many years of experience in the testing of loudspeakers and audio products. His work at Consumers Union had earned him the praise of his superiors, CU's readers and the audio industry (J.A. 201-03);

d) the draft Report to Editorial was edited and revised by Seligson's superiors and all drafts of the article plus all galleys and page proofs were circulated to numerous persons at Consumers Union in various departments for revision and editing (J.A. 129-37, 145-47; App. X32-34), all in accordance with Consumers Union's normal editorial procedures (J.A. 198-200);

e) Consumers Union produced at trial all of its research data and editorial material. Bose produced

nothing;

f) the published article fairly reflected the results of Consumers Union's own research, both favorable and unfavorable to the Bose product;[27]

g) the trial court made three findings in support of Seligson's cred-

27. Nothing in the research data or in the published article was so inherently improbable that only a reckless person would have put it in circulation and the District Court made no such finding. Indeed, that Court fully credited Seligson's and Lefkow's testimony on the localization effects they heard (App. X94-97) and flatly rejected Bose's contention of scientific impossibility. (App. X98-99) Seligson's testimony that in preparing the article he neither perceived nor intended any defamatory or disparaging innuendo (J.A. 163-69) was uncontradicted. The Court's holding that the single phrase "about the room" carried with it an innuendo of "bizarre"

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ibility and lack of subjective motive to disparage. They are all unchallenged on appeal and are all inconsistent with the finding of actual malice:

-- after considering the demeanor of the witnesses, "especially that of Seligson" (App. X136), the trial court rejected petitioner's efforts, which took up much time at trial, to establish Seligson's (and CU's) dishonesty and bias because of a patent held by him (id.);

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or "grotesque" effects was without any foundation in the record. Significantly, the article makes no such statement. In fact, read fairly in context, as it should be, the article flatly contradicts any such innuendo or implication. The article states that the localization problems "seemed inconsequential" with orchestral music and that when listening to soloists only that "we think they might become annoying" (emphasis added). To find liability here based on the content of the article -- as in effect the District Court did in part -- constitutes "Malice in Wonderland."

-- the District Court similarly rejected Bose's argument that Seligson and his assistant Lefkow "completely fabricated" the so-called cricket test (App. X152-53 n.12);

-- the trial judge found that when Seligson thought the Bose's performance on a particular test was too low because of the Bose's unconventional design, Seligson exercised his subjective judgment to upgrade the rating of the Bose 901. (App. X59)

Standing in contrast to this evidence and these findings -- all of which unequivocally show that Consumers Union exhibited a constant concern to publish a truthful and accurate article and that Seligson spoke the truth at trial --

was nothing else.[28]

28. Petitioner contends for the first time in this Court that other evidence exists to buttress the trial court's finding of actual malice. (Pet. Br. at 36-37, 55-60) The trial court, however, did not rely on any such evidence in making its finding and petitioner made no such arguments in the Court of Appeals. (Pet. Br. in Ct. of App., pp. 32-38) The District Court limited itself solely to the purported fact of falsity and Seligson's intelligence.

Moreover, petitioner's "other" evidence is not supported by the record. Petitioner asserts that all Consumers Union heard was movement associated with "normal stereo sound" or produced by special recordings, and faults CU for failing to compare the Bose 901 with a conventional loudspeaker during the special listening test, for failing to conduct a test using twelve "young music students" and for refusing to conduct a demonstration of the loudspeaker or to identify what records had been played during the test at a post-publication meeting between CU and petitioner on June 3, 1970. (Pet. Br. at 52-60)

The special listening test, however, was a comparative test. As described in

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There was no evidence in the record found or relied upon by the District Court which showed that Consumers Union

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the Report to Editorial quoted by the District Court (App. X151 n.11, 154-56) and by Seligson at trial (J.A. 102), the Bose 901 and, for a brief time, another unconventional loudspeaker, the Harman Kardon HK-50, were compared to a conventional loudspeaker during "several hours [of listening] to a variety of records." (App. X60) Seligson and Lekfow played not special recordings, but a "large" number of records which were selected at "random" from the "closet full of recordings which [CU had] accumulated over the years" of classical and popular music. (J.A. 151, 227, 236-37)

Although urged to do so by petitioner, the District Court did not find that CU heard only "normal stereo sound" or that the wandering was induced by special recordings. As noted, the District Court credited fully Seligson's and Lefkow's uncontroverted descriptions of what they had heard. (App. X94-97) There was also no evidence to contradict Seligson's, Lefkow's and Dr. Green's testimony that what they had heard on the Bose they did not hear with conventional loudspeakers. (J.A. 103-04, 162-63, 167-68, 182-86, 305-10, 327-28) Dr. Bose

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published a knowing falsity or recklessly disregarded the truth.

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himself testified that movement-inducing special recordings were "not a factor" in 1970. (J.A. 56-57)

Finally, Consumers Union's purported post-publication refusal to provide information or demonstrate the 901 to Dr. Bose does not constitute evidence of actual malice. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). In fact, in response to Bose's complaints, Consumers Union retested the Bose 901 three separate times -- once in June 1970 (J.A. 203-06), and then in 1979 (J.A. 177-78; LTr. 10-10-18; PX31; LTr 13-26-27, 13-145-146) and again in 1980. The 1980 retest was a scientific experiment designed and conducted by Dr. Green and involved playing the Bose 901 and a conventional loudspeaker to sixteen subjects who were not affiliated with Bose or with Consumers Union. (J.A. 286-302, 304, 311-15) The data from all three tests were introduced at trial and confirmed the accuracy of Consumers Union's article in all respects.

Despite the passage of ten years time between the publication date and trial, despite its claims in this Court and despite the fact that it had the burden of proof, Bose introduced no test data relating to the performance of the Bose 901 system or conventional loudspeakers.

All that the District Court relied on was that Court's conclusion that since the "plain, ordinary meaning" of "about" was crystal clear,[29] and that since Seligson was an "intelligent person," it is simply impossible for the Court to believe that he knew the article to be truthful. (App. X142) Such a finding of lack of credibility is a facile ipse dixit which cannot withstand even limited appellate scrutiny.

Disbelief of a publisher's statement of good faith cannnot constitute clear

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29. But, cf. "'A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.'" Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 867 n.17 (5th Cir. 1970) (quoting Towne v. Eisner, 245 U.S. 418, 425 (1918)).

and convincing proof[30] of actual malice where it stands alone, and is (a) in contradiction to the District Court's own findings that in all other vital respects the author's testimony was entirely credible, that the author and the publisher had no motive to disparage petitioner's product, that the author had in another part of the article upgraded the evaluation of the Bose 901 and that

30. This standard of proof has been characterized as being "'intermediate between the normal 'preponderance of the evidence' civil standard and the 'beyond the reasonable doubt' criminal standard,'" Yiamouyiannis v. Consumers Union of United States, Inc., 619 F.2d 932, 940 (2d Cir.), cert. denied, 449 U.S. 839 (1980); Addington v. Texas, 441 U.S. 418, 424 (1979); and as proof which must be "strong, positive and free from doubt ...full, clear and decisive...." Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161, 175 (1975) (citations omitted).

the author was an expert at what he did; and is (b) in conflict with uncontroverted evidence that the author was highly respected in his field, that what was being described was an abstract, subjective perception of an ambiguous aural phenomenon, published in the context of an aesthetic review, that the publisher followed its normally careful editorial processes designed to insure accuracy and freedom from bias, that the article was balanced in that it presented both praise and criticism and that it contained language explicitly limiting the negative impact of the comment in question.

Even in the ordinary civil action where plaintiff need prove his case only by a preponderance of the evidence, it has long been the rule that disbelief

alone does "not supply a want of proof," Moore v. Chesapeake & Ohio Ry. Co., 340 U.S. 573, 576 (1951), sufficient even to create a jury question.

This Court and others have often cautioned against the impropriety of using disbelief alone to support a finding that the opposite is the fact. Nishikawa v. Dulles, 356 U.S. 129, 137 (1958); NLRB v. Gotham Industries, Inc., 406 F.2d 1306, 1310 (1st Cir. 1969); Janigan v. Taylor, 344 F.2d 781, 784 (1st Cir.), cert. denied, 382 U.S. 879 (1965); Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952) (L. Hand, J.).

If disbelief alone cannot provide sufficient proof in the ordinary civil case, it is even more inadequate in this case when the plaintiff's constitution-

ally mandated burden of proof is much higher and the societal interest "in the correctness of [the] factual conclusions" is more substantial. Addington v. Texas, 441 U.S. 418, 423 (1979).

Internally inconsistent, inherently incredible, and without any affirmative proof to support it, the trial court's finding of actual malice is clearly erroneous.

Moreover, the trial court's finding makes no rational sense. Seligson and Lefkow, when asked at trial to translate their aural perceptions into pictoral form, produced drawings which punctiliously depicted what they heard: "wandering sounds [in the words of the

District Court] within a few feet of a wall near which the Bose 901 loudspeakers were placed." (App. X100, footnote omitted)

Had these men had any doubts that the article described something else, had these men been prevaricators engaged in a plan to besmirch petitioner's product, would they not have attempted to cover up their lie and instead drawn charts showing the sound to have moved all over the listening room?

Only their own integrity and honesty -- as the District Court found in rejecting all other challenges to their credibility -- and their good faith belief in what they wrote prevented them from doing so. The trial court's finding to the contrary is simply not in accord with

one's "experience with the mainsprings of human conduct." Commissioner v. Duberstein, 363 U.S. 278, 289 (1960).

As the Court of Appeals realized, the evidence admits of only one conclusion: defendant may have chosen the wrong phrase in its aesthetic critique, but it did so in the honest belief that it was uttering the truth.[31]

Conclusion

Under any standard of appellate review, the trial court's finding of actual malice was constitutionally and

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31. Since the "record permits only one resolution of the factual issue[s]," there is no need to remand this case back to the Court of Appeals for further consideration. Pullman-Standard v. Swint, 456 U.S. 273, 292 (1982).

factually inadequate. It was properly reversed by the Court of Appeals and that reversal should be affirmed by this Court.*

Dated: New York, New York
July 13, 1983

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